INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement:	
A. The applications to the Commission	3
B. The hearing	6
1. Present and potential needs of the port and the area it serves	7
2. The feasibility of applicants' plan of operation	9
3. The benefits of additional facilities	11
C. The Commission's decision	13
1. The original report	13
2. The first supplemental report	16
3. The second supplemental report	16
D. Proceedings in the district court	18
Argument:	
Introduction and summary	20
I. The district court acted improperly in setting aside the Commission's finding that the public convenience and necessity required competitive rail service to the port	22
A. The court failed to accord the Commission's finding responsible review under correct standards	22
B. In the circumstances of this case, this Court, rather than remand to the district court for further consideration applying proper standards of review, should itself review and sustain the Commission's conclusion that competitive service to the port was required by the public need	28

225-890—66—1

Argument—Continued Page

II. The Commission's action in approving without further hearing the supplemental applications, which requested authorization to provide service within the port, did not deny the intervenors their procedural rights and was supported by substantial evidence 29

III. If a further hearing was required, it should have been limited to the changed rental 37

Conclusion 38

Appendix 39

CITATIONS

Cases:

Brotherhood of Locomotive Engineers v. *United States*, 217 F. Supp. 98 32

Consolidated Edison Co. v. *Labor Board*, 305 U.S. 197 24

Consolo v. *Federal Maritime Comm'n*, 383 U.S. 607 ..... 24, 28

Dixie Carriers Inc. v. *United States*, 351 U.S. 56 2

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 26

Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 7 26

General Motors Corp. v. *Penna. R. Co.*, 301 I.C.C. 447 4

General Motors Corp. v. *United States*, 299 F. 2d 233, certiorari denied, 371 U.S. 813 23

Great Lakes Steel Corp. v. *United States*, 220 F. 2d 751, certiorari denied, 350 U.S. 821 23

Illinois Commerce Comm'n v. *United States*, 292 U.S. 474 4

Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 23

Interstate Commerce Commission v. *Oregon-Washington R. Co.*, 288 U.S. 14 ..... 34, 36

Interstate Commerce Commission v. *Parker*, 326 U.S. 60 23

Labor Board v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 24

Rice and Co. v. *United States*, 341 U.S. 907, reversing 96 F. Supp. 452 32

Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80 25

Cases—Continued Page

Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 26
Switching Rates in Chicago District, 215 I.C.C.45 4
Switching Rates in Chicago Switching District, 177 I.C.C. 669 4
United States v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499 25
United States v. *Detroit Navigation Co.*, 326 U.S. 236 .. 22
United States v. *Drum*, 368 U.S. 370 2
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 ..... 23, 26, 37
Woodruff v. *United States*, 40 F. Supp. 949 32

Statutes:

Administrative Procedure Act, 60 Stat. 237, (5 U.S.C. 1001 *et seq.*):
Sec. 4 32
Sec. 5 ..... 23, 32, 42
Interstate Commerce Act 24 Stat. 379, as amended, (49 U.S.C. 1, *et seq.*):
Sec. 1(18) 5, 14, 32, 39
Sec. 1(19) 32
Sec. 5(2) 5, 32, 40
Sec. 20a(6) 32
National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, 1001, and 1231) 39

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 20

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 1404) is reported at 241 F. Supp. 974. The reports of the Interstate Commerce Commission (R. 263, 384, 499) are printed at 307 I.C.C. 493, 312 I.C.C. 277, and 317 I.C.C. 502.

JURISDICTION

This proceeding was brought in a three-judge federal district court under 28 U.S.C. 1336, 2284, 2321–2325, to set aside orders of the Interstate Commerce Commission. The judgment of the district court setting the orders aside was entered on April 30, 1965

(R. 1447). The United States and the Interstate Commerce Commission filed their notice of appeal on June 29, 1965 (R. 1471). This Court noted probable jurisdiction on November 15, 1965 (R. 1473, 382 U.S. 913). We invoke the jurisdiction of this Court under 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum*, 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56.

QUESTIONS PRESENTED

The completion of the St. Lawrence Seaway is expected to bring a great increase in ocean-going freight to the Great Lakes ports. Chicago, the largest city on the Great Lakes, created the Chicago Regional Port District to build a new harbor to serve this traffic. The District built docks on Lake Calumet and also railroad trackage and switching facilities within the port to make possible adequate railroad service to and from the docks. Seven railroads applied for authorization from the Interstate Commerce Commission to serve the port. A railroad with exclusive access to the port and another operating in the area intervened in opposition to the applications. The questions presented are:

1. Whether, in light of the potential increase in railroad traffic to and from the Chicago Regional Port District, the Commission's determination that a certificate of public convenience and necessity should be granted the applicants to enable them to offer multiple rail service to the port was supported by substantial evidence.

2. Whether the Commission's failure to hold a sup-

plemental hearing prior to approving a change in the rental specified in the applicants' agreement to lease the District's tracks denied the intervenors due process of law or deprived the Commission of an adequate evidentiary basis for authorizing the applicants to offer service within as well as to the port.

3. Whether, assuming *arguendo* that such an additional hearing should have been held, the court below erred in requiring a complete new hearing on all questions material to the operations of the applicants up to and within the port.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, 1001, and 1231), Sections 1(18) and 5(2) of the Interstate Commerce Act, as amended (49 U.S.C. 1(18) and 5(2)), and Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)) are set forth in the Appendix to this brief.

STATEMENT

A. THE APPLICATIONS TO THE COMMISSION

The Chicago Regional Port District (a municipal corporation) was created by the State of Illinois in 1951 in order to develop Lake Calumet into a major deep-water port facility for both domestic and import-export traffic via the St. Lawrence Seaway, including the handling and warehousing of freight in transit (R. 564–565). Lake Calumet was a shallow natural body of water located six miles down the Calumet River from Lake Michigan in the heart of the Chicago

Switching District.[1] In 1955 the District began dredging the Lake and constructing port facilities at its southern end (R. 569). It expended some $24 million for dredging and for construction of fourteen miles of railroad track within the port, docks, two large grain elevators, a Port District office, a warehouse with 200,000 square feet of space, three transit sheds with 300,000 square feet of space, and streets (R. 565, 573, 578, 581–582). The port was in service by mid-1957 (R. 565) as a public entity operated by private lessees (R. 568). It is open to all trucking companies, barge lines and steamship operators (R. 592–593).

The Port District had declared by resolution in 1954 that the public and the port's interest required that its trackage be accessible to as many railroads as possible (R. 566). At present, however, only one railroad, appellee Chicago, Rock Island and Pacific Railway Company (Rock Island) provides direct service to and from the port (R. 594, 600). Others must switch their cars to the Rock Island and receive their cars from it. Pursuant to a contract which expressly reserves to the District the right to permit other railroads to enter the port, the Rock Island operates

[1] The Chicago Switching District is a large zone around Chicago, including portions of Indiana, in which local rail movements may be made at uniform switching rates. *Switching Rates in Chicago Switching District*, 177 I.C.C. 669, 675–677; *General Motors Corp.* v. *Penna. R. Co.*, 301 I.C.C. 447, 449. See, also, *Switching Rates in Chicago District*, 215 I.C.C. 45; *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474, 476–477, 481–482.

within the port over trackage owned by the District.[2] The tracks of the other appellee, The New York, Chicago and St. Louis Railroad Company ("Nickel Plate"),[3] do not reach the port, but they are the nearest rail facilities to the Lake's east side, which has been reserved for future commercial development by the Port District (R. 1205). Other railroads have tracks nearby (R. 1205), and, in 1956, while the port was still under construction, six of them applied to the Interstate Commerce Commission for approval of a plan to serve the port directly via a new entry track to be constructed.

On October 22, 1956, the Illinois Central Railroad Company and the Pennsylvania Railroad Company requested authority from the Commission under 49 U.S.C. 1(18) to construct 1.431 miles of new track that would connect the port with tracks of an Illinois Central affiliate that pass near the Lake's southwestern shore (R. 1, 265). Joined by the Chicago South Shore and South Bend Railroad, they also applied for approval under 49 U.S.C. 5(2) of their acquisition of trackage rights that would give them access to the port via the proposed line and the affiliate's existing line (R. 5). On April 25, 1957, the Belt Railway Company of Chicago (R. 67), and on September 9, 1957, the Michigan Central Railroad Company, the New York Central Railroad Company, and the In-

[2] The Rock Island also serves Calumet Harbor Terminal, Inc., a private harbor facility, adjacent to the port, located on property owned by the Pennsylvania Railroad (R. 804–806).

[3] The Nickel Plate has merged into the Norfolk & Western Railroad Company since this proceeding began.

diana Harbor Belt Railroad Company applied for approval of similar trackage rights (R. 147).[4]

The Rock Island (R. 9–13, 116, 194–198), the Nickel Plate (R. 63–64, 115, 194–198) and various spokesmen representing interests which the port will serve intervened. Among the latter were the Secretary of Agriculture, the Port District, the Chicago Board of Trade, the Chicago Association of Commerce and Industry, and two private companies operating on the Lake, Calumet Harbor Terminal, Inc., and North Pier Terminal Company (R. 267). Except for the Rock Island and Nickel Plate, all participants in the proceeding supported the proposed expansion of rail service.

B. THE HEARING

A Hearing Examiner conducted a joint hearing on all of the applications. The hearing lasted from September 30 to October 11, 1957 (R. 549). The central issue was whether the present and future public convenience and necessity would be served by the additional rail service proposed. Extensive economic evidence was presented on the present and potential needs of the port and the area it serves; the feasibility of the applicants' plan of operation, including their arrangements for service within the port; and the benefits of additional service. This evidence may be summarized as follows:

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[4] A map is reproduced opposite R. 1204.

1. PRESENT AND POTENTIAL NEEDS OF THE PORT AND THE AREA IT SERVES

The Port of Chicago is located in the industrial and agricultural heartland of the United States. As the largest Great Lakes port for general cargo, it has grown steadily as a center for international trade (R. 894–895). By 1955 its waterborne traffic, including domestic, Canadian and overseas shipments, totalled 71,490,510 tons (R. 895). Metropolitan Chicago is a huge manufacturing and trade center (R. 893). It also serves as a market and transportation center for mid-Continent America, which produces a variety of industrial and agricultural products for foreign and domestic consumption (R. 670, 887–888, 895–900).

Chicago has important potential as a port for the export of grain to foreign markets (R. 605–606, 760, 776–777, 847). The 14-State area tributary to its grain market produces 64 percent of all the wheat, 73 percent of the corn, 81 percent of the oats, 78 percent of the barley, and 80 percent of the soy beans grown in the United States (R. 249, 886–888). Substantial quantities of these crops are already exported through Chicago because inland rates to it are significantly lower than rates to Atlantic and Gulf ports (R. 776–777). Insufficient facilities for moving grain to dock-side could defeat these advantages. Service by a single railroad does not appear adequate for a major port like Calumet, which should be the terminus for a number of major grain-carrying roads (R. 652, 736, 741, 746).

In addition, the mid-Continent area served by the port processes or consumes a wide variety of imported raw materials, manufactured goods and foodstuffs from overseas that can be moved into the area directly by ship via the St. Lawrence Seaway and the Great Lakes. This traffic ranges from metal ores and lumber to processed foodstuffs and foreign automobiles (R. 670–671).

Lake Calumet is designed to be the major deep-water facility of the Port of Chicago. It is linked to Lake Michigan by a channel in the Calumet River (R. 1205) and connects with the Mississippi River system by the Calumet-Sag Channel (R. 725, 898–899). Its future growth, both as an outlet for the many industries located in the Chicago Switching District and as a harbor serving the entire Middle West, depends upon its ability at the outset of its development to guarantee fast and efficient service (R. 594, 652, 675, 725–726).

The port's potential is great (R. 776–777, 846–847). The St. Lawrence Seaway will in the long run render it accessible to a large volume of ocean traffic (R. 853–856). Ships of twenty-one foreign steamship lines already call at Chicago (R. 897). Success as a port for ocean shipping depends importantly upon an ample rail car supply, direct rail access and ample back-up yards in which to stage cars. Vessels which the Seaway can bring to the port carry up to 350 carloads of cargo (R. 732); and proper servicing of such vessels requires a steady flow of cars and an efficient system for arranging switching movements to and from the vessel (R. 675–676). If vessels cannot be

quickly serviced, the resulting delays can cripple the port's growth, since turn-around time for large vessels is a significant factor in the rates charged by their operators (R. 919–920). Also, if shipments are delayed by inadequate inland transportation, international credit transactions may be frustrated (R. 666–667). Thus, to satisfy commercial needs the port must offer reliable rail operations which can guarantee a continuous flow of cars from shipper to vessel and from the vessel to the ultimate consignee (R. 675–676).

The port at present is subject to the limitations of single-carrier service. Cars being moved to it must often be switched among three different railroad lines, and always to the Rock Island, with consequent delays for handling and classification and increased charges (see R. 1131). The port's car supply is limited with only one carrier serving it (R. 613), and any disruption of operations on the Rock Island, due to labor disputes or other difficulties, could close all rail access to the port (R. 613).

2. THE FEASIBILITY OF APPLICANTS' PLAN OF OPERATION

The feasibility of applicants' plan of operation was a major issue in the hearing (R., 629–630, 655–656, 675, 731). Their proposal involved both bringing cars to the boundary of the port and moving them within it. Applicants had not applied to the Commission for authority to operate over the District's tracks within the port because they believed it was unnecessary to do so (R. 270–271). Nevertheless, the provisions of their proposed arrangements with the

District, consisting of a proposed lease (R. 1134–1140) and a proposed agreement among the applicants for joint use and maintenance of the District's tracks (R. 491–496, 1132), were introduced in evidence, were the subject of cross-examination by the appellees (R. 731, 800), and were considered by the Commission.

The applicants' plan of operation provided for trackage rights that would permit the six operating railroads to move cars in their own trains from their own yards in the Chicago area directly to the port without switching to other lines (R. 675, 491–496) and without congestion or over-crowding due to too frequent scheduling (R. 675–676, 695–698). The proposed joint facilities agreement provided for applicants' operations within the port (R. 1132, 491–496). A supervisor reporting to a Board of Managers appointed by the participating railroads would direct switching operations and maintenance of the port's rail facilities (R. 494). These would be performed by jointly provided engines, personnel and equipment (R. 492–494). The cost of this joint service would be divided monthly under a formula based on the ratio of each participant's loaded cars to the total of all participants' loaded cars handled in the port (R. 495).

The proposed lease agreement between the District and the applicants (R. 1135–1140) provided that the railroads would pay rent for use of the District's facilities, maintain them at their own expense, and provide necessary switching service. The rental proposed was based on 5 percent of an unspecified valuation, but was not to exceed $2 per car loaded or empty

(including locomotives) moved to and from the property during the year (R. 1138). The agreement also provided that no other railroad company could operate facilities on the District's property to serve the harbor area without approval of the applicants, except companies with present contract rights (R. 1136), although any other railroad with physical connections to the property could become a party to the proposed lease agreement upon accepting its terms and conditions (R. 1137). Within the port, the applicants were to operate under joint supervision and to furnish railroad service as needed to its tenants.[5]

3. THE BENEFITS OF ADDITIONAL FACILITIES

The port would benefit substantially from multiple rail service (R. 594, 613–614, 629–630). The plan would bring directly into the port the far-reaching rail network of each of the applicants (R. 666–669, 777, 886–888).[6] It would make available the combined yard capacity of the applicants in the Chicago area of 61,601 cars—twelve times that of the Rock Island (R. 1411); all of these yards are within quick running time to the port. It would also strengthen the port's competitive position (R. 857–858, 776–777).

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[5] As proposed, the plan also contemplated that the new track would cut and render useless tracks of the Rock Island serving Calumet Harbor Terminal, Inc. (see n. 2, *supra*, p. 5) (R. 805, 806–807, 809).

[6] The Belt Railway Company of Chicago, for example, is owned by twelve Eastern and Western roads, and has direct connections with each of them and with all other lines owned by them operating in and out of Chicago, as well as with all lines in the Chicago Switching District but two (R. 705–707).

Almost every major ocean port enjoys multiple rail service (R. 660). Such service shortens time for shipment in transit, makes cars more readily available, and lowers the cost both to shippers and to carriers (R. 613–614, 652, 658–659, 662–663, 673–674, 688–691). This is of particular significance with respect to switching charges of the terminal carrier, which the line-haul carrier must absorb (R. 613, 658–659). If a single carrier handles a car from origin to destination, it is in transit for a shorter period, because delays resulting from inter-line switching and interchanges are avoided (R. 588, 853).

The plan would improve local rail service ("cross-town switching") in the Chicago industrial complex. Within the Chicago Switching District, the switching lines divide revenue under a fixed formula which progressively increases rates and charges, depending on whether a 1-line, 2-line, or 3-line switching movement is required to deliver the car (R. 1131). These costs would be lowered because the proposed service would furnish 1,917 additional industries in the Switching District with single line service to the port and furnish all others with 2-line switching service (R. 304–305, 658, 668, 713, 741). Such cost reductions could divert some truck traffic to the rails (R. 924).

Grain movements particularly would benefit by increased direct service, which would reduce costs, save time, and improve car supply by permitting faster shuttle of cars between country elevators and the port (R. 759–760, 764–767, 772, 776–778). And comparative experience of shippers among ports with multiple

rail service and ports served by a single road showed that competitive operations provide more economical and efficient service to the general public (R. 656–657, 660, 776–777).

Thus, the applicants' plan would assure greater rail competition, expand greatly single-line service to the port, reduce inter-line switching, provide more rapid turn-around of empty equipment, increase the available car supply, and lower rates to industries in the area. The risks and disadvantages of dependence by a major port for grain and general cargo upon continued operation of a single railroad through which all traffic must be funneled would be ended (R. 613–614).

C. THE COMMISSION'S DECISION

1. THE ORIGINAL REPORT

The Examiner recommended approval of the applications before him (R. 210–262). On October 5, 1959 the Commission adopted his recommendations with minor modifications (R. 263–315). It found that there was a need for the proposed service (R. 310) and approved the applications to provide service up to the Port District (R. 313–314). The Commission did not find that the Rock Island had failed to provide adequate service but based its decision, rather, on the ground that the potential increase in future traffic at the port, primarily from the St. Lawrence Seaway, made it "imperative * * * that at the very beginning of this new era of development a plan and system for handling the transportation needs of the

port be established which will assure the type of service that is expected and will provide for steady progress and expansion. Admission of the applicants to the area will supply such needed service." (R. 294.)

It further found that the Rock Island's ability to serve the port would not be impaired and that "the benefits to shippers and receivers of freight to be served directly by the applicants outweigh any injury which might result to the Rock Island" (R. 305). It concluded that approval of the applications

> would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor. * * * [R. 309.]
>
> The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. * * * [R. 310.]

However, it rejected the applicants' contention that their proposed operations inside the port were not subject to Commission approval under 49 U.S.C. 1(18), ruling that they would have to submit formally for its approval their arrangements for this purpose

(R. 270–271, 313). In considering the evidence introduced on applicants' plan of operation within the port, the Commission reviewed the proposed lease agreement between the Port District and the applicants (R. 278–280) and the applicants' proposed joint facilities agreement (R. 280–281), and required elimination of the provision in the proposed lease restricting the District from contracting with other railroads to operate within the port, on the ground that it would unduly restrain competition (R. 313, 279). It also ruled that the Rock Island's service to Calumet Harbor Terminal, Inc., was not to be disrupted and that every industry located at Lake Calumet Harbor was to have direct rail service, not only from the applicants, but from the Rock Island and Nickel-Plate as well, if they desired to serve them (R. 313–314).

The Commission also considered the feasibility of the proposed extension of service from the applicants' standpoint (R. 284):

> Counsel for the Rock Island contends that the expense represented by charges for trackage rights and other charges involved in the operation by the applicants into the port will exceed the revenues to be derived from such service under applicable tariff provisions, and that we should not authorize an operation which can only result in deficits insofar as the applicants are concerned. The record shows that if direct service by the applicants to the port is permitted, the line-haul business, without doubt, will provide profitable operations for the applicants. As for the crosstown switching service, the charges to be assessed are in-

definite, and no doubt will be adjusted to cover actual costs for the service provided. We are convinced, on this record, that the service to the port proposed by the applicants will not be improvident.

2. THE FIRST SUPPLEMENTAL REPORT

In April 1960, the applicants filed supplemental applications for specific authority to operate within the port (R. 329). The proposed lease was substantially identical to the lease considered in the hearing except that it omitted the anti-competitive provision that the Commission had previously disapproved (R. 337–343). On September 19, 1960, the Commission held: (1) the previous hearing had furnished a record adequate to support approval of the entire plan, including the joint facilities agreement and the lease arrangement, which had been received in evidence and considered in the original hearing; (2) the need for the service had already been found; and (3) the supplemental applications merely corrected a "technical deficiency" (R. 390, 391–393). It therefore denied respondents' request for a hearing, holding that it would not be proper to "revisit upon the applicants and intervening parties the additional time and expense incident to a long repetitious hearing" (R. 390). It approved the applicants' arrangements, but stated that if any further changes were made in the lease agreement, further approval would be necessary (R. 392).

3. THE SECOND SUPPLEMENTAL REPORT

In June 1961 the applicants and the Port District executed a lease agreement which modified some of

the terms of the proposed agreement previously approved by the Commission (R. 432–441). The principal change in the final contract related to the basis for calculating the annual rent. The proposed lease (see pp. 10–11, *supra*) had based the rental on 5 percent of an undetermined valuation of the Port District rail facilities, in an amount not to exceed the equivalent of $2 per car, loaded or empty, including locomotives. The executed lease provided for a flat charge of $2 for each revenue car (*i.e.*, loaded freight car) (R. 436–437). The modified agreement also provided that it was not intended to apply to industry-owned tracks within the port or affect the Rock Island's rights to operate there or grant any exclusive preference to use of the port's property (R. 433–434). With the executed lease the applicants also submitted to the Commission the executed revision of their joint facilities agreement for centralized supervision of their operations within the port (R. 490).

On November 26, 1962, the Commission approved the executed lease. It denied respondents' request for a hearing, on the ground that the general public convenience and necessity for applicants' operation within the port had already been determined and that most of the intervenors' objections were a challenge to the overall proposal. Treating the joint facilities agreement as an adjunct to the lease, the Commission held that it did not in itself require approval (R. 509–510). It found most of the changes in the lease to be simply a clearer definition of the rights and responsibilities of the parties (R. 511). As to the changes in the rental formula, it held (R. 508):

We do not agree with the interveners that lack of information concerning the future value of the tracks or the volume of traffic anticipated thereover bars approval of the modified agreement. We have never adopted any exclusive formula for determining the reasonableness of proposed rentals for railroad trackage. We believe that rentals generally may be considered reasonable where, as here, the facts of record disclose that non-affiliated parties, after bargaining at arms length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the interveners' ability to continue to serve the public will not be impaired.

D. PROCEEDINGS IN THE DISTRICT COURT

The Nickel Plate and the Rock Island filed suit in the United States District Court for the Northern District of Ohio to enjoin the Commission's orders (R. 1172). The three-judge district court, Circuit Judge Edwards dissenting in part (R. 1421), vacated the orders on the grounds that they were not supported by substantial evidence and that the intervening carriers had been denied due process of law (R. 1404).

The majority concluded that the evidence supported the Commission's findings concerning the port's traffic potential, its commercial, industrial and agricultural importance, and its need for substantially broader rail service at the outset of its development to assure service to shippers and to provide for the port's development. It also sustained the Commission's findings that applicants' plan of operation would result in im-

proved service and lower costs (R. 1409–1411). Nevertheless, it held that the record "does not offer ample support" for the Commission's grant of authority to operate up to the door of the port (R. 1415).

It also held that there was insufficient evidence to support the Commission's grant of authority to the applicants to operate within the Port District. The court reasoned that the rental provisions under the final plan differed materially from the rental provisions under the plan originally proposed (R. 1419), thus requiring a further hearing (R. 1417). In the court's view, moreover, the Nickel Plate and the Rock Island would be required to operate under the terms of the agreement between the District and their competitors, without having had an opportunity to present evidence and cross-examine in regard to the managerial and economic aspects of the final plan (R. 1419). Holding that operation up to the boundary of the Port District could not be considered apart from operation within the District, it ordered a complete rehearing on all issues (R. 1420).

Judge Edwards, dissenting in part, found that there was substantial evidence to support the Commission's grant of authority to operate up to the Port District line (R. 1436–1437). He concluded, however, that the supplemental orders were not supported by substantial evidence, because of the Commission's failure to grant respondents a hearing in connection with the modified arrangements for operating within the port. This did not require reopening of all issues, in his view, but only a further hearing limited to "the tech-

nical requirements and fairness of the operating plan within the Port District and the charges necessary to support this service." (R. 1446.)

ARGUMENT

INTRODUCTION AND SUMMARY

The district court unanimously found that substantial evidence supported the Commission's "important" findings concerning the applicants' proposal for multiple rail service to Lake Calumet. It agreed with the Commission that the prospects for greatly increased traffic via the St. Lawrence Seaway necessitate substantially broadened railroad service into and out of the port; that the applicants' proposed service into the port would be more direct, entail less handling, and be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic; that it is imperative that a plan for handling the transportation needs of the port be established now, to provide for steady progress and expansion; and that "competition for shipper benefit" is one of the factors to be considered by the Commission in granting authority. Nevertheless, it set aside the Commission's entire authorization.

It analyzed the issues in two categories: *first*, the applicants' proposal to provide multiple rail service up to the port, approved in the Commission's original report after a comprehensive hearing into the proposed operations both outside and inside the port; and *second*, their proposed arrangements for service within the port, approved in the supplemental orders and reports without further evidentiary hearings. As to

the first category, the court held without explanation that the Commission's ultimate conclusion did not have "ample support in fact or law." As to the second, it found that the final arrangements for operations within the port, by modifying the original formula for computing rental for use of the District's tracks, differed so significantly from the proposal previously authorized that, without an evidentiary hearing showing the precise effect of the changed rental terms upon the profitability of the service within the port, the supplemental orders were unsupported by substantial evidence and procedurally invalid. It added that the entire matter should be remanded to the Commission for rehearing on all issues.

The immediate effect of the decision is to delay still further a plan for multiple rail service to Lake Calumet Port that would end the monopoly presently enjoyed by the Rock Island and bring needed competition to a growing transportation market. Shippers and receivers of freight, the major industrial and grain-producing areas the port is designed to serve, and the nation's transportation system have been deprived of the more direct service, greater car supply and lower charges which competition would bring to the port.

We submit that the court's decision is erroneous, and that the Commission's orders should be sustained. First, the unexplained rejection of the Commission's determinations with respect to service up to the port is a clear abuse of the judicial review function in light

of the court's earlier conclusion that substantial evidence supported the Commission's key findings. The court pointed to no defect in the record to support its ruling, and adopted an incorrect standard for review—"ample support."

Second, it improperly required a further hearing on the rental charges. The reasonableness of those charges, so far as relevant, had already been resolved in the original hearing in which appellees participated and the change in the rental formula was not material.

Finally, it again exceeded its function as a reviewing court when it required relitigation of all the issues, the rental issue being plainly severable.

I. THE DISTRICT COURT ACTED IMPROPERLY IN SETTING ASIDE THE COMMISSION'S FINDING THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRED COMPETITIVE RAIL SERVICE TO THE PORT

A. THE COURT FAILED TO ACCORD THE COMMISSION'S FINDING RESPONSIBLE REVIEW UNDER CORRECT STANDARDS

Judicial review of administrative determinations is, of course, normally quite limited. Especially is this true with regard to a determination by the Interstate Commerce Commission as to whether the public convenience and necessity require a proposed extension of rail service. This is a question peculiarly within the Commission's specialized knowledge and experience. The Commission's function in such a case "is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit*

Navigation Co., 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65. The reviewing court's function is limited to determining whether the Commission's decision is free of legal error, supported by substantial evidence, and not arbitrary or procedurally unfair. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515. "Unless in some specific respect there has been prejudicial departure from the requirements of law or abuse of the Commission's discretion, the reviewing court is without authority to intervene." *United States* v. *Pierce Auto Freight Lines, supra*, 327 U.S. at 536. These basic principles were not followed by the three-judge district court in this case.

1. As we have already noted, the court below rejected the Commission's finding of public convenience and necessity with respect to additional rail service to the port of Chicago because, in its view, it did not have "ample support" in the record. That, however, is not the applicable standard. The test on judicial review is, rather, whether the administrative decision is supported by "substantial evidence" on the record viewed as a whole. See 5 U.S.C. 1009(e)(5) (Administrative Procedure Act); *General Motors Corp.* v. *United States*, 299 F. 2d 233, 234 (C.A. 6), certiorari denied, 371 U.S. 813; *Great Lakes Steel Corp.* v. *United States*, 220 F. 2d 751 (C.A. 6), certiorari denied, 350 U.S. 821. Substantial evidence is merely "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought

to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. It "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 620. The novel "ample support" formulation of the court below, although ambiguous, would appear to require a greater quantum of proof—evidence that is not merely "adequate" (*Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229), but, in the reviewing court's view, preponderant. The imposition of this higher standard was clearly improper. Cf. *Consolo* v. *Federal Maritime Commission*, *supra*, 383 U.S. at 618–621.

To be sure, the "ample support" standard articulated by the court may be no more than an inadvertence in adapting an opinion sustaining the Commission on this point to one rejecting its conclusion.[7] But we are not free to read between the lines. The re-

[7] As Circuit Judge Edwards indicated in his dissenting opinion (R. 1421), that opinion, insofar as it dealt with the issue of public need for additional service to the port, was originally drafted as an opinion for the court upholding the Commission's determination on this point. The majority adopted this portion of Judge Edwards' opinion essentially intact—all but the conclusion. Where Judge Edwards' opinion declared that the Commission's finding of public convenience and necessity had "ample support" in the record, the majority changed this to read that the Commission's finding did not have "ample support" in the record. No other material changes were made.

viewing court owes it to the Commission, to the parties and to this Court to say what it means and it must be taken at its word. Moreover, as will appear presently, the court's opinion as a whole, generally approving the Commission's underlying findings and rejecting only its result, without specifically pointing out error, is not consistent with proper standards of judicial review of administrative action. Every indication is, rather, that the court applied an improper standard.

2. The court found "substantial support in this record" for the Commission's findings concerning the port's needs and the importance of providing competitive rail service now, at the outset of the port's development (R. 1409–1411). It nevertheless concluded that the Commission's ultimate finding of public convenience and necessity must be set aside. No reason was given or appears why that finding was deemed improper or inadequate.

When a court sets aside the action of an agency that has been delegated primary responsibility for regulating a segment of the nation's economy, respect for the congressional scheme requires that it—no less than the agency (*United States* v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499, 511; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94)—declare the basis of its action. This precept is grounded in the division of responsibilities between agency and reviewing court. The court may not reject an administrative finding merely because its judgment on the issue resolved by the finding differs

from the agency's. "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. [Citation omitted.] But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. "After the remand was made * * *, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *Securities and Exchange Commission* v. *Chenery Corp.* 332 U.S. 194, 201; see *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. Here, however, the court indicated no "specific respect" in which the Commission had erred (*United States* v. *Pierce Auto Freight Lines, supra,* 327 U.S. at 536); it pointed to no error requiring correction.

The result is that the Commission is without any guidance on how to treat on remand the issue whether the public convenience and necessity require additional service to the port. If the Commission merely reaffirms its original determination, this would presumably be regarded by the court below as non-compliance with the court's mandate. However, by failing to state wherein the Commission's approach was erroneous, the court has indicated no different course that the Commission should follow on remand. This method of judicial review does not return the case

to the Commission with its errors elucidated; it forecloses the Commission from performing its statutory duty—here, determining whether a public need for the proposed service exists.

It is no answer that the court may have believed that the Commission's failure to conduct a hearing with respect to the supplemental applications for service within the port undermined its determination that service to the port should be permitted. There is no indication the court so reasoned; all indications are to the contrary. The court treated the issues as separate—as indeed they are. The issue on which a further hearing was sought and denied related not to whether additional service both to and within the port was warranted, but merely to the terms on which the applicants would utilize the facilities of the Port District in providing service within the port (see, further, pp. 30–31, *infra*). Appellees did not contend that *no* contract could be negotiated with the Port District that would enable the applicants to provide such service upon reasonable terms—only that the Commission did not deal in sufficient depth with the reasonableness of the particular terms agreed upon. That issue is severable from the issue whether the public need requires additional service to the port; proving that the particular contract was unreasonable would not establish that the Commission's determination upon the latter issue was not supported by substantial evidence.

3. The court below upheld all of the Commission's findings that were necessary to sustain its ultimate conclusion that the public convenience and necessity

required the additional service to the port proposed by the applicants (see p. 25, *supra*). Having found "substantial support" for the Commission's findings that the additional service was warranted by the traffic potential of the port, the court's reviewing function was exhausted. Its agreement with the Commission on all of the essential subsidiary findings required the court to sustain the Commission's conclusion.

B. IN THE CIRCUMSTANCES OF THIS CASE, THIS COURT, RATHER THAN REMAND TO THE DISTRICT COURT FOR FURTHER CONSIDERATION APPLYING PROPER STANDARDS OF REVIEW, SHOULD ITSELF REVIEW AND SUSTAIN THE COMMISSION'S CONCLUSION THAT COMPETITIVE SERVICE TO THE PORT WAS REQUIRED BY THE PUBLIC NEED

Ordinarily, this Court, if it agreed that the court below had applied improper standards in the review of an administrative decision, would remand the case to the lower court for reconsideration applying proper standards. But this is not an inflexible rule; in appropriate cases the Court will apply the standard directly, without remanding the case. *E.g., Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 621. We think that course is appropriate here. The serious adverse consequences to the public interest if a resolution of this controversy (already 10 years old) is further delayed have already been noted (p. 21, *supra*). In addition, "the relevant standard is not hard to apply in this instance" (*Consolo* v. *Federal Maritime Comm'n*, *supra*, 383 U.S. at 621). As noted, the district court itself upheld all of the findings necessary to sustain the Commission's ultimate conclusion that the public need required the additional

service proposed by the applicants, and the correctness of these findings has not been challenged in this Court. We submit, further, that the facts reviewed in the Statement, *supra,* pp. 7–13, establish beyond possibility of dispute that the Commission's relevant findings were supported by substantial evidence upon the record considered as a whole. Accordingly, a remand would serve no useful purpose.

II. THE COMMISSION'S ACTION IN APPROVING WITHOUT FURTHER HEARING THE SUPPLEMENTAL APPLICATIONS, WHICH REQUESTED AUTHORIZATION TO PROVIDE SERVICE WITHIN THE PORT, DID NOT DENY THE INTERVENORS THEIR PROCEDURAL RIGHTS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Initially, the applicants, while submitting their plans to provide service within as well as up to the port, did not formally request the Commission to approve their arrangements (the joint facilities agreement and the lease agreement with the Port District) regarding service within the port, on the supposition that such approval was not required. The Commission ruled otherwise. The applicants accordingly made a formal request for approval, which was granted without further evidentiary hearings. The lease agreement was later modified and submitted to the Commission, which approved it, again without a further hearing. The court found that the refusal to hold a hearing on the modified agreement denied the intervenors due process of law and, in addition, destroyed the evidentiary basis for the Commission's approval of their plan to provide service within the port. We think this ruling was erroneous.

We emphasize that the issue is not whether a hearing to determine if the public need required that the applicants be permitted to operate within as well as to the port was improperly denied; it is far narrower. Extensive evidence had been introduced at the hearing before the examiner on the applicants' proposal to operate within the port. On the very first day of the hearing the proposal had been described in detail (R. 674–687) and the joint facilities agreement (governing co-ordination of the applicants' service within the port) placed in the record. A little later, the proposed lease agreement between the applicants and the Port District for use of the District's rail facilities was furnished the intervenors to assist them in cross-examination when it was placed in the record (R. 793). They exercised their right of cross-examination. A full record on the issue of service within the port was thus made.

To be sure, the Commission in its original report deemed itself unable formally to authorize the applicants to operate "over the tracks owned by, and located within, the Port District," since authority to do so had not been formally requested (R. 271). But this was a purely technical deficiency. It was promptly corrected by the filing of supplemental applications. In approving these applications, the Commission was deciding upon a comprehensive record made in the original hearing. All of the material issues relating to service to and within the port had there been fully explored. Thus, had the parties not modified the terms of the lease agreement that had

been placed in the record, and approved by the Commission in its second report, we believe there would be no contention that a further hearing was required.

While the lease agreement was changed in a number of particulars, only one was regarded by the court below, or cited by the intervenors, as sufficiently material and substantial to warrant a hearing. That was the change in the formula for computing the annual rental due the Port District from the applicants for use of the District's rail facilities.[8] In the original lease, the rental was set as 5 percent of a yet-to-be-determined valuation of the District's rail facilities (later established as $747,184.04 (R. 508); but in no event was it to exceed the equivalent of $2 per car, loaded or empty, or locomotive, used to service the port during the year (R. 1138). As modified, the

[8] The other changes are as follows: To comply with Illinois land law the contract was converted from a "lease" to a "use" agreement. The preamble was amended to take note of the Rock Island's existing rights and the Nickel Plate's proximity to the port. In accordance with the Commission's earlier ruling, the contract was amended to provide expressly that it is for non-exclusive use of the District's facilities. The agreement was expressly made subject to the Rock Island's existing rights in the port. The Port District reserved the right to independently make separate agreements with other railroads, and to grant right-of-way easements to its industrial tenants for the construction of industry-owned tracks which might connect with conveniently located carriers (such as Nickel Plate and the Rock Island). Any other railroads which obtained approval from the Port District and the Commission could become a party to the applicants' use agreement upon accepting its terms. R. 432–439. These changes plainly raised no material issues of fact requiring evidentiary hearing, and appellees did not specifically object to them.

agreement eliminated the 5 percent formula and substituted a flat charge of $2 for each partially or fully loaded "revenue" car (thus excluding empties and locomotives) (R. 436). It is this change, and this alone, that in the view of the court below required the Commission to conduct a further evidentiary hearing.

A. We submit that the Commission's refusal to hold such further hearing on this issue did not deny the intervenors any procedural rights.

1. Except upon the request of the governor of a State, or other appropriate State authority (no such request was made in this case), the Commission is not required by statute to hold hearings on requests, like that of the applicants here, for extensions of service under Section 1(18) of the Interstate Commerce Act. *Woodruff* v. *United States,* 40 F. Supp. 949 (D. Conn.). The relevant provisions provide only that "the Commission may hold hearings, as it sees fit" (49 U.S.C. 1(19), 20a(6)).[9] See, also, 49 U.S.C. 5(2)(b). Thus, no statutory right of the intervenors was infringed by the denial of a hearing.

2. The intervenors were not bound by the agreements pertaining to the proposed service within the port. The joint facilities agreement was binding only

[9] Although Commission proceedings are in general subject to the Administrative Procedure Act (*Riss and Co.* v. *United States*, 341 U.S. 907, reversing 96 F. Supp. 452 (W.D. Mo.), proceedings under Section 1(18) are not subject to the hearing requirements of Sections 4 and 5 of that Act (5 U.S.C. 1004, 1005) because they are not "required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 1004). See *Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (D. Ohio).

upon the parties who signed it; the intervenors did not. The lease agreement applied only to cars moved by the applicants, was made expressly subject to Rock Island's existing agreement with the District, and left the other intervenor, Nickel Plate, free to make its own arrangements with the Port District. Agreements that the intervenors had or might make with the District were thus not affected by the applicants' agreements or any changes made therein. The district court's statement that the intervenors nevertheless "will be required to operate" under the terms of the agreements approved by the Commission (R. 1419) has no basis in the record.

3. Nor did the change in the rental formula prejudice or disadvantage the intervenors. Under the new formula, the applicants' rental will increase with increasing traffic. If business is good, the total rental will presumably exceed the rental that would have been computed upon the basis of 5 percent of the agreed valuation. The intervenors cannot be hurt if the rental paid by their competitors should be higher than originally approved by the Commission. If business is poor, the rental under the modified agreement will be roughly the same as under the old (where $2 per car had been the maximum), though perhaps slightly lower since empties and locomotives are excluded in the new formula. The intervenors have never suggested that the change could be great enough to have competitive significance; it seems plain it could not.

We conclude that the intervenors had no right to be heard on the rental change. It remains only to

show that there is likewise no merit to the complaint that the Commission, by failing to conduct such a hearing, based its approval of the final lease agreement upon an inadequate record.

B. The Commission may not approve a proposed extension of service unless it is shown that "either presently or in the reasonably near future [the new service] will be self-sustaining, or so nearly so as not unduly to burden interstate commerce" (*Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14, 37). The Commission gave careful attention to this point in its original report, finding on the basis of the record made in the hearing before the examiner that the applicants' proposal for service within as well as to the port would be reasonably self-sustaining. See Statement, *supra*, pp. 15–16. The court below found that a hearing was required to determine whether the modification in the rental formula might substantially undermine the prospects for self-sustaining service. We disagree.

The Commission originally approved a formula that specified an annual rental of $2 per car as a ceiling. So, presumably, the Commission was satisfied that the applicants would be able, without substantial risk of impairing their financial ability to render the service in question, to pay at least this much annual rental. If the revised formula had exceeded this ceiling, there might be cause for concern. But it did not. It was in fact lower, for while it prescribed the same $2 rate it limited the rate to loaded freight cars; no charge was made for empties or locomotives. In the cir-

cumstances, we do not think that the Commission was required to conduct a hearing for the purpose of comparing the new rental with the total costs of the service to be provided by the applicants in order to assure iteself that the service would be self-sustaining. On a per-car basis, the new rental would in all events be less than the per-car maximum originally approved.[10]

In addition, we think that the Commission was within its discretion in assuming that the parties to the lease agreement, bargaining at arm's length, could be relied upon to agree upon a fair and not exorbitant rental. That much deference to managerial discretion and responsibility was reasonable. Before protracting the proceedings by granting a further hearing on the modification in rental basis negotiated by the parties the Commission was entitled to insist that some reason be shown for believing that the rental was so excessive as substantially to impair the prospects for a self-sustaining service. No such showing was attempted or made.

There is some language (R. 1419) in the district court's opinion that suggests a broader concern with the evidentiary basis of the Commission's action in approving the supplemental applications. While our reading of the court's opinion as a whole persuades us that the court's concern was indeed limited to the rental change, the court may conceivably have believed that the Commission failed generally to give adequate consideration to the costs of the proposed service.

[10] Of course, the total rental under the new formula might be higher than under the old. But proportionately it could not exceed the maximum prescribed under the old.

However, elaborate cost data are not required to show that a proposed service will be self-sustaining and the Commission's analysis was, we submit, adequate and supported by substantial evidence.

The Commission's inquiry in an extension case is not directed at determining the net return of the proposed service to the applicant carriers. It asks whether future traffic potential is likely to permit the new service to be "self-sustaining, or so nearly so as not unduly to burden interstate commerce" (*Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14, 37)—assuming the reasonable and compensatory rates that regulated carriers are required to charge for service. The carrier, therefore, need prove only the need for the potential service; demonstrate that the volume of traffic is likely to support its operations; and show generally what its costs will be so that the Commission can determine that they fall within reasonable limits. When the Commission has been satisfied on these points, it may reasonably conclude that the new service meets the needs of shippers and their customers and that the transportation system will not be injured by the undertaking. This the Commission did (Statement, *supra*, pp. 15–16). As both the majority and dissenting opinions in *Oregon-Washington* make clear, the Commission was not required to go further—as the court below apparently assumed (R. 1419)—and find that the service would provide an accounting profit.

The Commission, throughout this proceeding, accorded the right to be heard to all who might be af-

fected by Commission action. However, the need for flexibility in administrative proceedings, especially proceedings as complex and protracted as this one, where the public interest clearly requires a prompt decision on additional railroad service for the rapidly expanding Great Lakes traffic, justified the Commission in terminating the hearing process when the essentials of the applicants' operations in the Port District were determined and only details remained to be settled. No substantial rights of the appellees were prejudiced by this effort to expedite the proceeding, and the appellees' contention that they are entitled to a further hearing seems merely a delaying tactic. This Court has held that whether or not such a hearing is to be granted or denied is a question committed to the Commission's discretion and that "[o]nly a showing of the clearest abuse" of that discretion warrants reversal of the Commission's determination. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535. No such abuse of discretion has been demonstrated here.

III. IF A FURTHER HEARING WAS REQUIRED, IT SHOULD HAVE BEEN LIMITED TO THE CHANGED RENTAL

Should this Court disagree with us on Point II, and hold that the Commission improperly denied a further hearing on the issues raised by the supplemental applications, still, it was error for the court below to order a complete rehearing upon all the issues in the case (R. 1420). The only issue not fully covered in the hearing before the examiner was the subsequent change in the rental formula. To the ex-

tent that such change is material, its effects can be reassessed in a separate hearing that would simply supplement the record already made. There is no need to reconsider all of the public convenience and necessity issues and thus postpone indefinitely the completion of this already protracted proceeding, now in its tenth year. As Judge Edwards pointed out in his dissenting opinion, "as to all of * * * [the] most important phases" of this case, "there has been a thorough hearing and fair consideration." (R. 1446.) Since the only error found by the court related to a distinctly severable (and we think unquestionably minor) issue, there is no warrant for a complete rehearing.

CONCLUSION

The judgment should be reversed, and the case remanded with directions to sustain the Commission's orders under review.

Respectfully submitted.

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AUGUST 1966.

APPENDIX

National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Sections 1, 301, 901, 1001, and 1231:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(18) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(18) provides:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of rail-

road, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. § 5(2), provides:

Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another

through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with

the modifications, so found to be just and reasonable * * *.

* * * * * *

Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(e), provides:

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

U.S. GOVERNMENT PRINTING OFFICE: 1966